

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION**

CIVIL NO. 1:07CV336

TIMOTHY KIRK FOXX,

Plaintiff,

Vs.

ORDER

**THE TOWN OF FLETCHER, a
municipality organized under the
laws of North Carolina; MARK
BIBERDORF, in his individual and
official capacities; LANGDON B.
RAYMOND, in his individual and
official capacities; MICHAEL STEVE
MORGAN, in his individual and
official capacities; WILLIAM B.
MOORE, in his individual and official
capacities; JIM CLAYTON, in his
individual and official capacities;
HUGH CLARK, in his individual and
official capacities; BOB DAVY, in his
individual and official capacities; and
EDDIE HENDERSON, in his individual
and official capacities,**

Defendants.

THIS MATTER is before the Court on an objection and motion to
quash subpoena, filed by Ronald L. Moore, District Attorney for North

Carolina's 28th Prosecutorial District. **Objection and Motion to Quash, filed December 4, 2007.**

District Attorney Moore's objection and motion pertain to a subpoena issued by counsel for Plaintiff Timothy Kirk Foxx. **Exhibit A, attached to Objection and Motion to Quash, *supra*.** The subpoena was signed on November 21, 2007, and it requests 16 separate sets of records, including, among other things, personnel files, psychological tests, and performance reviews relating to Defendant Langdon B. Raymond, as well as a number of policy manuals and unspecified correspondence between the District Attorney's office and all Defendants. ***Id.* at 1, 3-4.**

District Attorney Moore objects to the subpoena on grounds that (1) it is addressed to the "Buncombe County District Attorney's Office," which does not exist; and (2) "it appears to ask for personnel files that are not subject to subpoena." **Objection and Motion to Quash, *supra*, at 1.** Plaintiff has not responded to District Attorney Moore's objection and motion to quash, and the time in which to do so has now expired. **See LR 7.1(E) (providing that "[r]esponses to motions, if any, shall be filed within fourteen (14) days of the date on which the motion is served, as evidenced by the certificate of service attached to said motion.").**

The District Attorney's assertion that the subpoena addresses a non-existent party is well-founded. Furthermore, Federal Rule of Civil Procedure 45 provides that "[a] person withholding subpoenaed information under a claim that it is privileged . . . must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents . . . in a manner that . . . will enable the parties to assess the claim." **Fed. R. Civ. P. 45(d)(2)(A)**. District Attorney Moore has complied with this requirement, and no response has been forthcoming from Plaintiff.

Rule 45 further provides that "[o]n timely motion, the issuing court *must* quash or modify a subpoena that . . . requires disclosure of privileged or other protected matter, if no exception or waiver applies[.]" **Fed. R. Civ. P. 45(c)(3)(A) (emphasis added)**. In this case, the District Attorney's claim of privilege appears to be supported by N.C. Gen. Stat. § 153A-98, which provides for the confidentiality of personnel records of county employees – with exceptions only for name, age, employment dates, and other basic information whose scope is far exceeded by Plaintiff's subpoena request. **N.C. Gen. Stat. § 153A-98(b)**. Plaintiff has provided no reason why § 153A-98 does not apply in this context. Accordingly, the Court is obligated under Rule 45 to quash the subpoena.

IT IS, THEREFORE, ORDERED that District Attorney Moore's motion to quash the subpoena served upon the "Buncombe County District Attorney's Office" is hereby **GRANTED**, and the subpoena issued November 21, 2007, is hereby **QUASHED**.

Signed: December 28, 2007

A handwritten signature in dark ink, appearing to read "Lacy H. Thornburg", is written over a horizontal line.

Lacy H. Thornburg
United States District Judge

